Horizons Hotel Corporation d/b/a Carib Inn of San Juan *and* Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 24–CA–5423

November 22, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 15, 1993, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] to provide a new remedy,[4] and to adopt the recommended Order as modified below.[5]

REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent discriminatorily refused to consider for hire or to hire employees formerly employed by its predecessor because of their union affiliation, we shall order the Respondent to offer all individuals who would have been hired on and after June 1, 1986, employment in the positions for which they would have been hired absent the Respondent's unlawful discrimination or, if those positions no longer exist, to substantially equivalent positions, dismissing, if necessary, any and all persons hired to fill such positions. We shall also order the Respondent to make whole all individuals whom it would have hired absent this unlawful discrimination for any loss of earnings and other benefits they may have suffered as a result of the Respondent's conduct. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6]

---

[1] The General Counsel's motion to strike the Respondent's brief is denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's ''effectiveness to make credibility resolutions on the personal observations of the witnesses was . . . dampened by his lack of knowledge of the Spanish Language.'' The Board has held, however, that the conduct of its proceedings in English, with the concomitant use of a translator, is not a ground for overturning credibility resolutions. See generally *Union Nacional de Trabajadores*, 219 NLRB 862 fn. 2 (1975).

The Respondent further argues that the judge was biased and prejudiced towards its case in that he allegedly fell asleep during its cross-examination of the General Counsel's witnesses. The General Counsel contests the Respondent's assertion in his answering brief. In rejecting the Respondent's argument, we stress that the Respondent raised no objection to the judge's alleged conduct during the hearing itself, as would have been proper under the Board's Rules and Regulations. See, e.g., Secs. 101.10(b) and 102.41. We also find, based on our review of the entire record, that there is no evidence here demonstrating that the judge was biased and prejudiced against the Respondent's position.

Additionally, the Respondent asserts that the judge erred in finding that it did not hire any of its predecessor's employees who had worked as service employees. Although the Respondent did hire a few of these unit employees, the record shows that they worked in either managerial or supervisory jobs after the Respondent assumed control of the facility.

While noting that Gloria Pantojas became personnel manager for the hotel when the Respondent began operations on June 1, 1986, the judge incorrectly stated that Pantojas held this position until April 30, 1986. The record, though vague on this subject, suggests that Gloria Pantojas served as personnel director for at least several years. In any event, we find that correction of the judge's misstatement is insufficient to affect his ultimate conclusions here.

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) of the Act by refusing to consider for hire or to hire any of its predecessor's service employees in unit jobs, we stress that, as the judge found, the Respondent failed to rebut the General Counsel's prima facie case of unlawful discrimination as required by *Wright Line*, 251 NLRB 1083 (1980). However, we find it unnecessary to rely on the judge's analysis insofar as he stated that: (1) ''it appears more 'logical' that management might have been a cause of the [predecessor's] bankruptcy rather than the work habits of service employees''; (2) the Respondent's failure to hire these employees for unit jobs was '''inherently destructive' of important employees' rights''; and (3) ''[t]he Respondent did not explain with any credible evidence why the workers chosen to be employed at its hotel were better qualified or would have been superior employees to those which it rejected.''

[4] In the remedy section of his decision, the judge based the discriminatees' backpay and reinstatement rights on the collective-bargaining agreement between the Respondent's predecessor and the Union. We note, however, that the bankruptcy trustee lawfully terminated this agreement on March 20, 1986. Nevertheless, based on our finding that the Respondent discriminatorily refused to consider for hire or to hire any of its predecessor's employees, we conclude that the Respondent was not entitled to set initial terms of employment without first consulting the Union. See *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979). Accordingly, we shall order the Respondent to cancel, on request by the Union, any changes in the employees' wages and benefits that the Respondent made when it began operating the hotel on June 1, 1986, and to make these employees whole for any losses they suffered because of these unilateral changes.

[5] Although the judge found that the Respondent violated Sec. 8(a)(1) of the Act in certain respects, he inadvertently failed to include a provision in his recommended Order and notice requiring that the Respondent cease and desist from such conduct. We shall modify the judge's Order and notice accordingly.

[6] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Under *New Horizons*, interest is computed at the ''short-term Federal rate''

Having found that the Respondent also has unlawfully refused to bargain collectively with the Union, we shall order that the Respondent, on request, recognize and bargain collectively in good faith with the Union in the service and casino bargaining units concerning rates of pay, wages, hours, and other terms and conditions of employment which the Respondent would have been required to bargain had the Union's lawful status been acknowledged on June 1, 1986—the date that the Respondent began operations at the hotel. In addition, we shall order the Respondent to cancel, on request by the Union, any changes in wages and benefits that the Respondent made when it began operations; to make whole the service unit employees for any losses they suffered because of these unilateral changes from June 1, 1986, until the Respondent negotiates in good faith with the Union to agreement or to impasse; and to make whole similarly the casino unit employees for any changes that occurred from the date the Respondent began operations until it ceased casino operations on June 23, 1986.[7] Because the casino bargaining unit no longer exists, we shall also order the Respondent, in the event it reestablishes a casino on the hotel premises, to recognize and bargain with the Union concerning these employees and to offer employment to those former casino employees listed as discriminatees in Exhibit C of the judge's decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Horizons Hotel Corporation d/b/a Carib Inn of San Juan, Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs accordingly.

''(a) Creating the impression of surveillance of the employees' union activities, threatening employees with discharge because of their union activities, and denigrating the Union in the eyes of the employees.''

2. Insert the following as paragraphs 2(c) and (d), and reletter the subsequent paragraphs accordingly.

''(c) On request by the Union, cancel any changes in wages and benefits for the service and casino unit employees that the Respondent made when it began operations on June 1, 1986. Make whole the service unit employees for any losses they suffered because of these unilateral changes from the date the Respondent began operations, until the Respondent negotiates in good faith with the Union to agreement or to impasse, and similarly make whole the casino unit employees from June 1, 1986, until the Respondent ceased casino operations on June 23, 1986.

''(d) In the event the Respondent reestablishes a casino on its hotel premises, recognize and bargain with the Union concerning these employees and offer employment to those former casino employees listed as discriminatees in Exhibit C of the judge's decision.''

3. Substitute the attached Appendix D for that of the administrative law judge.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT create the impression of surveillance of our employees' union activities, threaten our employees with discharge because of their union activities, or denigrate the Union in the eyes of our employees.

WE WILL NOT discourage membership in Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO or any other labor organization by discriminatorily refusing to hire applicants for employment or by unlawfully discriminating in any other manner in regard to their hire, tenure, or terms and conditions of employment.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of our employees at our hotel.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate employment to the following named persons to the jobs they would have filled had they been lawfully hired, or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any employees hired since June 1, 1986, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision and to otherwise comply fully with the remedy.

Carmen Ojeda	Margarita Claussell
Maria Caldero	Frank Rosado

for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[7] The remission of any wage and benefit loss that these employees incurred is to be applied consistently with the make-whole remedy set forth above with respect to the discriminatees.

Mineroa Vazquez	Ramon Luis Rosario
Tomasa Garcia	Blas Ortiz
Beatriz Hiraldo	Jose Justiniano
Tomasina Garcia	Raul Velazquez
Candida Santana	Julio Rodriguez
Carmen M. Colon	Orlando Trinidad
Isabel Rodriguez	Maximino Carbo
Gloria Concepcion	Delia A. Osorio [Ana Delia]
Juana Ayala	Aurea Santana
Felix B. Ramos	Emerita Escudero
Miguel Andrillon	Ramon Matos Cintron
Jesus Terreforte	Hiram M. Miranda
Julio Vega	Francisco Jimenez
Esmelin Santos	Heriberto Trujillo
Manuel Vazquez	Hector Guevarez
Felix Ramirez	Ana M. Guariola
William Rivera	Monserrate Colon
Rafael Matos	Conchita Rodriguez
William Martinez	Maria De Jesus
Carmen De Jesus	Ana Verte Calderon
Lydia Noguera	Gloria Caballero
Matilde Ramos	Domingo P. Morales
Elba Iris Verdejo	Victor Cruz
Sarah Algarin	Basilisa Rivera Garcia
Filiberto Jaime	Juanita Hernandez
Jesus Diaz	Carlos Gonzalez
Remuel Q. Perez	Roberto Perira
Juan M. Colon	Fernando V. Vazquez
Carmelo J. Caldera	Valentian Hernaiz Delgado
Norberto A. Cruz	
Isaias Diaz Virella	
Iris C. Hernandez	

WE WILL, on request, bargain collectively with the Union as the exclusive representative commencing as of June 1, 1986, of all our employees in the units found appropriate.

WE WILL, on request, cancel any changes in wages and benefits for the service and casino unit employees that we made on beginning our operations, and WE WILL make whole the service unit employees for any losses they suffered because of these unilateral changes from June 1, 1986, until we negotiate in good faith with the Union to agreenment or to impasse, and WE WILL similarly make whole the casino unit employees from June 1, 1986, until we ceased casino operations on June 23, 1986.

WE WILL, on reestablishing a casino on our hotel premises, recognize and bargain with the Union concerning these employees and offer employment to those former casino employees listed above against whom we have discriminated.

Angel Valencia-Aponte, Esq., for the General Counsel.
Luis F. Padilla, Esq., of Hato Rey, Puerto Rico, and *Benito Fernandez*, for the Respondent.
Ruben Davila, of Santurce, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. The original charge filed by Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) on August 6, 1986, was served on Horizons Hotel Corporation d/b/a Carib Inn of San Juan (the Respondent) by certified mail on or about the same date. An amended charge filed by the Union on September 30, 1986, was served on the Respondent by certified mail on October 1, 1986. The first amended charge filed by the Union on March 20, 1987, was served on the Respondent by certified mail on the same date. The second amended charge filed by the Union on December 11, 1987, was served on the Respondent on December 14, 1987. A complaint and notice of hearing was issued September 30, 1986. An amended complaint and notice of hearing was issued on December 21, 1987. In the amended complaint, among other things, it was alleged that the Respondent as the successor to bankrupt Carib Inn of San Juan Corp. a/k/a Carib Inn of San Juan Prinair Hotel Corp. of P.R., Racket Club Hotel (the predecessor) was obligated to bargain collectively with the Union and, in filling its complement of employees, discriminated against the predecessor's employees all in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer alleging that it had not engaged in the unfair labor practices alleged.

The matter came on for hearing on March 6–10, April 17, November 20–22 and 24, 1989; April 4, August 13–16, October 18, 1990; and March 11–13 and 15, 1991. Two hearing sessions were held at Eglin Air Force Base Federal Prison Camp, Fort Walton, Florida, and April 4 and October 18, 1990, all other sessions were held at Hato Rey, Puerto Rico.

Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs.

Thereafter, on August 22, 1991, I approved, on agreement of the parties, an order conditionally approving withdrawal request pursuant to settlement agreement, a copy of which is attached as Exhibit A.

On October 22, 1991, the General Counsel filed an application for reinstatement of instant charge for further proceedings. On December 12, 1991, an Order to Show Cause why the application should not be granted was issued. On January 17, 1992, it was ordered that ''the Order Conditionally Approving Withdrawal Request Pursuant to Settlement Agreement entered on August 22, 1991 be revoked and hereby is and a date for filing briefs on the merits of the case is set for February 18, 1992.'' Thereafter the General Counsel and the Respondent filed briefs and reply briefs.[1] All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

[1] On the request of the Respondent, parties were permitted to file reply briefs.

FINDINGS OF FACT,[2] CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent, a corporation organized under the laws of the Commonwealth of Puerto Rico, has been engaged in providing facilities for lodging, entertainment, food, beverage, and related services and operates a facility located at Isla Verde Road, Carolina, Puerto Rico (the hotel).

In the course and conduct of its business operations described above, the Respondent, during the last 12-month period, derived gross revenues in excess of $500,000 and, during the same period of time, purchased and received goods and products valued in excess of $50,000 directly from suppliers located outside the Commonwealth of Puerto Rico.

The Respondent is, and has been at all times material, an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

First: In or about November 1985, Bankruptcy Judge William Beckerleg ordered the then Chapter 7 trustee, Hector Rodriguez-Estrada, to sell or liquidate the assets of a hotel owned by Carib Inn of San Juan Corporation d/b/a Carib Inn Hotel and Casino. Prior to this period, the hotel had been administered by various owners and involved in numerous bankruptcy proceedings.

On or about May 14, 1986, the Respondent purchased the business of Carib Inn of San Juan Corp. a/k/a Carib Inn of San Juan Prinair Hotel Corp. of P.R., Racket Club Hotel (the predecessor), from Hector Rodriguez-Estrada, trustee in bankruptcy (Rodriguez-Estrada), and since June 1, 1986, has continued to operate the business of Carib Inn in basically unchanged form as it had been previously operated by Carib Inn and Rodriguez-Estrada except that the casino license of the predecessor expired on June 23, 1986, and thereafter the casino ceased operations. At the time of the purchase Rodriguez-Estrada operated and managed the assets of the predecessor and was involved in the sale of the assets as trustee appointed by the bankruptcy court. Prior to the sale several bids were submitted for the purchase.[3] The Respondent's bid was accepted. Prior to finalizing the purchase, Benito Fernandez, president of the Respondent, and other Respondent representatives visited the hotel premises on many occasions.

In respect to these matters before me, the parties stipulated as follows:

> Horizons Hotel Corporation, d/b/a Carib Inn Tennis Club and Casino, and/or Carib Inn Tennis Club & Resort, hereinafter called Respondent, a corporation organized under the laws of the Commonwealth of Puerto Rico in April 7, 1986, has been engaged in providing facilities for lodging, entertainment, food, beverage, and related services and operates a hotel located at Los Gobernadores Avenue, Carolina, Puerto Rico, herein called the hotel.
>
> In May 1981 Carib Inn of San Juan Corporation, a separate and distinct corporation organized under the laws of Puerto Rico which operated the hotel whose business is described above, filed a petition for bankruptcy under 11 U.S.C. Chapter 11.
>
> On November 21, 1985, the Chapter 11 proceeding was converted to a Chapter 7 proceeding.
>
> On November 21, 1985, Hector Rodgriguez Estrada was appointed by the bankruptcy court as trustee in bankruptcy for the Carib Inn of San Juan Corporation.
>
> From November 21, 1985 through May 31, 1986, Hector Rodriguez Estrada, continued the operations of the hotel business of Carib Inn in basically unchanged form and in an interrupted manner.
>
> On May 14, 1986 Carib Inn of San Juan Corporation sold its hotel facilities to Respondent. . . .
>
> Since June 1, 1986 Respondent has continued the operations of the hotel.
>
> On June 1, 1986 Gloria Pantojas became Respondent's Personnel Manager, a position she held until April 30, 1986.
>
> On March 20, 1986 Hector Rodriguez Estrada terminated, under Title 11, Chapter 7, Section 365 of the Bankruptcy Act, the collective bargaining agreement between the Union and Carib Inn for the service and maintenance unit.[4]

[2] The facts found are based on the record as a whole and the observation of the witnesses. The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction of the findings, their testimonies have been discredited either as having been in conflict with the testimonies of credible witnesses or because the testimony was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

[3] On or about February 28, 1986, Horizons Investors Corp. offered to purchase the assets of Carib Inn of San Juan Corp., in the United States Bankruptcy Court for the District of Puerto Rico in a Chapter 7 proceeding in a case entitled ''*In Re: Carib-Inn of San Juan Corp*., Debtor, No. B–81–00273(B), Chapter 7.''

On May 14, 1986, Horizons Hotel Corporation d/b/a Carib Inn Tennis Club and Casino of San Juan, the Respondent, purchased the assets of Carib Inn of San Juan Corporation from a trustee of the United States Bankruptcy Court for the District of Puerto Rico. Pursuant to the provisions of a deed, the trustee was given a 2-week grace period to surrender the hotel property which term expired on May 31, 1986. By order dated June 6, 1986, the bankruptcy court confirmed the Respondent's purchase of the hotel.

[4] Had the collective-bargaining agreement not been terminated, it would have expired on May 31, 1988.

From June 14, 1979, through May 31, 1986, the Union was the representative for the purpose of collective bargaining of the employees in the service and casino employees units, by virtue of Section 9(a) of the Act.[5]

Respondent, since June 1, 1986, has continued the business operation previously conducted by Carib Inn of San Juan Corporation at the same hotel facilities, with basically the same equipment, furniture and moveable goods, offering basically the same services except the operation of a casino[6] to the same sort of potential customers, same telephone numbers, and without interruption of services.

The following employees, who had been employed by the Carib Inn of San Juan Corporation, continued in the employment of the Respondent: Gloria Pantojas continued as personnel director or manager; Angel Rosario continued as security chief; Ramon Pantojas or Ramon Pantojas Rivera continued as night auditor and manager; Gilberto Santa continued as pool manager; Aida Ocasio continued as executive housekeeper; Osvaldo De Graci continued as security guard; Juan Gomez continued as resident manager; and Rodriguez-Estrada as consultant and then general manager. Few, if any, rank-and-file service and maintenance employees continued with the Respondent. A majority of the employees put to work by Horizons in the service unit would have been the predecessor's employees if the Respondent had not been guilty of unlawful discrimination (see infra). The restaurants were continued without change. The Respondent used the same advertising agency and the same nonunion and union classifications were continued.

In regard to the casino unit, 14 employees of the predecessor were put to work by the Respondent. Because the Respondent employed not more than 24 employees in the unit, a majority of the employees was continued in the casino unit. Although the Respondent claims that it did not operate the casino after June 1, 1986, it has produced no credible evidence to support this claim. On the other hand Resident Manager Gomez testified that the Respondent operated the casino. Filiberto Jaime-Ortiz, a casino employee, testified that on May 31, 1986, he observed a list in the casino employees' restroom ''[s]tating the names of the persons who had been recruited by the new corporation.'' Jaime-Ortiz further testified that Rafi Diaz, who had been his ''immediate boss,'' was recruited by Rodriguez-Estrada for employment with the Respondent. Moreover, the 14 above-mentioned employees appeared on the first payroll of the Respondent's workers along with employees in the service unit.

Both in the service unit and the casino unit there was ''substantial continuity in identity of the employing enterprise.''[7]

Both units satisfy the requirements for successor units as set forth in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). See also *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). Although the Respondent did not put to work a majority of the employees of the predecessor in the service unit it is, nevertheless, held to be a successor because had it not engaged in discriminatory hiring tactics a majority of the employees in that unit would have been the predecessor's employees (see infra). ''It is well established that where the other requisite elements for finding successorship are present, a new owner's failure to hire its predecessor's employees will not defeat a claim of successorship if such failure is shown to have been motivated by the former employees' union affiliation. . . . When a successor employer has discriminated in hiring, it can be inferred that substantially all the former employees would have been retained absent the unlawful discrimination.'' *American Press*, 280 NLRB 937, 938 (1986).[8] Accordingly, the Respondent, as successor employer, violated Section 8(a)(5) by refusing to bargain with the Union for the service and casino units and by refusing its request for bargaining rights.

Second: Benito Fernandez, president of Horizons, the successful bidder of the Carib Inn, testified: ''We began doing our due diligence[9] and looking at the property of the Carib Inn Hotel about November or December of 1985. And that process continued until May 31st of 1986 when we took over the property effective June 1, 1986.'' The Respondent's bid for the hotel was made ''sometime in February 1986.'' Fernandez testified that the Respondent considered in proposing its final bid: ''There was an appraisal that had been pre-

[5] The units are as follows:

SERVICE UNIT

Included: All employees employed by Respondent at its Hotel in Isla Verde, San Juan, Puerto Rico, in the following departments; Housekeeping, food and beverage (including food and beverage checkers and cashiers), repair and maintenance, laundry and valet, pool (including lifeguards), storekeeping, uniform service, telephone department employee, employees in the administrative and general department, front office employees, office clerical employees and secretaries.

Excluded: Executive personnel, professional personnel, pool manager, security employees, comptroller or auditor, assistant comptroller or assistant auditor, night auditor, accounts payable supervisor, accounts receivable supervisor, credit manager, timekeeper, personnel director, Tennis Professional, Assistant Tennis Professional, front office manager, Head Cashier Checker, head front office cashier, head food and beverage cashier (both day and night), payroll supervisor, head of storerooms and receiving, food and beverage comptroller, assistant food and beverage comptroller, assistant manager and maitre d' of the banquet office, executive chef, assistant maitre d', and the secretaries to manager, personnel director, comptroller or auditor, food and beverage manager, room division manager, sales manager and banquet manager, assistant payroll supervisor, guards and supervisors as defined in the Act.

CASINO UNIT

Included: All croupiers, apprentice croupiers and casino attendants employed by Respondent at the Hotel.

Excluded: All office clerical employees including cashiers, all other employees, professional personnel, guards and supervisors as defined in the Act.

[6] Because the Respondent was unable to obtain a license, the casino discontinued on June 23, 1986.

[7] See *Inland Container Corp.*, 275 NLRB 378 (1985).

[8] The Respondent concedes in its Br. 40, ''The Courts and Board alike have held however, that where the Union would have enjoyed majority status but for the new employer's discriminatory refusal to hire, the successor will ordinarily be subject to a bargaining order.''

[9] Fernandez defined ''due diligence'': ''We had to make an independent appraisal for ourselves as to the worth of what the property was so as to be able to compose a bid to submit to the Bankruptcy Court.''

pared by an independent licensed real estate appraiser by the name of McCluskey which penetrated into our consideration, our physical observation of the condition of the physical plant of the hotel, the financial statements, the history of the hotel in the past four or five years, its current occupancy rate and its current standing as a hotel in Puerto Rico what the marketplace thought of the hotel and the problems we foresaw in making this hotel an adequate profitable hotel property. All these items went into the consideration of how we compiled that final bid.''

Prior to the takeover of the hotel according to Fernandez, ''I tried every facility the hotel used from staying in every floor of the hotel to check out the rooms, from using the pool, from going to the restaurants. There are two restaurants, a Chinese and a Coffee Shop. To the gym, to even the stores that were in the facility.''

During the period while Fernandez was on the hotel premises prior to takeover, he testified that he spoke ''to all employees, supervisors and non-supervisors.''[10] He also conferred with Rodriguez-Estrada, the trustee who was operating the hotel. In fact, he hired Rodriguez-Estrada as a consultant for the Respondent ''to provide a better transition period for the corporation.'' Later Rodriguez-Estrada became manager of Horizons.

Third: During the period after the Respondent's acquisition of the hotel but before the Respondent took over operations, Fernandez and Rodriguez-Estrada occupied adjacent offices in the hotel and shared the same secretary. Rodriguez-Estrada hired Juan Rafael Gomez on May 19, 1986, as resident manager. He was on the trustee's payroll until May 31, 1986, and thereafter he became resident manager for the Respondent until August 27, 1986. The hiring of Gomez was approved by Fernandez. All employees were informed of this event in writing in which appeared the signature of Rodriguez and the signature approval of Fernandez. Gomez was told he would keep his job with the Respondent.[11]

Fernandez testified that he approved Gomez' hire because ''He [Rodriguez-Estrada] brought it to [his] attention that he could not hire a resident manager and that he needed [his] assistance otherwise he wouldn't be able to hire a resident manager'' and that the time with the trustee's operation would have been too short to have attracted an applicant.[12]

Rodriguez-Estrada testified in reference to the hiring of Gomez, ''Mr. Fernandez asked me to get somebody to continue the operation after I leave.''

Fourth: Gomez testified, ''I was hired to work for Horizons starting June 1st. So what I did on those 12 days I was in the office all the time working on the schedules, working on the marketing plan, working on those things we were going to use starting June 1st.'' This work was being performed for the Respondent.

Gomez also testified that Rodriguez-Estrada chose the managerial staff for the Respondent and discussed the supervisors to be hired with Gomez including Theresa Capo and Ramon Pantojas, ''in charge of Food and Beverage.'' Rodriguez-Estrada also offered supervisory jobs to Ramon Maysonet and Felix Ramirez, a waiter, to work for the Respondent after the Respondent ''took over the hotel.'' According to Gomez, Rodriguez-Estrada was the ''highest ranking managerial officer'' of the Respondent on June 1–3, 1986, which position he continued to hold. He was the general manager.

Fifth: On April 3, 1986, Rodriguez-Estrada met with Ileana Quinones,[13] general manager of the Professional Employment Center (PEC), at the hotel. Quinones explained that Rodriguez-Estrada had spoken to Hugo Valasco,[14] ''who happened to be a friend of his . . . that we had an agency and Hugo told—they spoke and Hugo told me that Rodriguez Estrada was waiting for my call.'' Quinones called Rodriguez-Estrada and made an appointment with him to discuss what services PEC could offer the Respondent. At a meeting on April 3, 1986, Rodriguez-Estrada told Quinones that ''the reason why he wanted [her] services was because a new management had come into the hotel and would be hiring new people.'' At the time Quinones was not aware that Rodriguez-Estrada was a trustee in bankruptcy. He appeared to her to be the ''top man at the company. He was running the show.''

According to Quinones, Rodriguez-Estrada said ''he would try to do business with us if he could pretty much be guaranteed that there would be no risk of having a union.'' ''[H]e asked me . . . in the temp industry[15] . . . 'Do you have Unions? Is there a chance for a Union?' I said, 'No.' Because in the nature of our industry, its never been heard of and he said, 'Put it in writing,''' that ''there was no possibility for a union.'' Other matters in relation to PEC's prospective services were also discussed. Rodriguez-Estrada told Quinones ''to put it in writing because he wanted to discuss this with Ben Fernandez.'' The next day a letter dated April 4, 1986, was directed to Hector Rodriguez-Estrada, Horizons Hotel, signed by Ileana Quinones. Enclosed with the letter was a description of the items covered in the Quinones-

[10] Six employees testified that Fernandez had never spoken to them. Some testified that they had never seen him talking to employees. Juan Gomez, who was hired as the Respondent's resident manager, testified that during the 12 days prior to June 1, 1986, when he was on the payroll of the trustee he saw Fernandez ''once or twice, he was in the office all the time with Rodriguez-Estrada.'' I credit the foregoing testimony.

[11] Gomez testified, ''I was hired for Horizons Hotel Corporation, I wasn't hired for the Bankruptcy Court.''

[12] It would appear that this rationalization is not well taken since first, Gomez testified that he did not need the job since he had another in the offering; second, it seems plausible that Rodriguez-Estrada could have operated 12 days without a resident manager as he had been doing; and third, Gomez did little work as a resident manager for Rodriguez-Estrada.

[13] The credibility of Quinones is challenged. I have carefully viewed her demeanor and attitude (as I did with all witnesses) and measured her testimony against the testimony of other witnesses and weighed it in the light of the record as a whole, I find Quinones to be a truthful witness and I credit her and discredit any witness who testified in contradiction of her testimony as credited. As to Fernandez, he appeared a very intelligent and able person but a disingenuous witness; his testimony was conditioned so as to support the Respondent in this case. As to Rodriguez-Estrada, he, by demeanor and attitude and by apparent sympathy with the Respondent's objectives, appeared to be an unreliable witness lacking veraciousness. I did not believe him where his testimony was not corroborated by other credible testimony or evidence in the record as a whole.

[14] Rodriguez-Estrada testified that Quinones was referred to him by Hugo Valasco, a friend of ''25 years.''

[15] The ''temp'' industry refers to a business which supplies temporary employees, who do not work on a permanent basis, for an employer.

Rodriguez-Estrada conversation. Some advantages were listed. The first ''particular'' was ''There is no possibility of a Union.''[16]

Thereafter, PEC placed advertisements and started to interview and send candidates to the hotel for Rodriguez-Estrada ''who had, at this point in time, I believe, turned over a lot of the recruiting operation over to [Mr.] Gomez.'' Quinones testified that Rodriguez-Estrada ''made . . . photographs of every person that solicited, attached to the—to the application, so he would recognize [the] people.''[17]

Early on Quinones understood that PEC would do the hiring for Horizons and recommended people it felt qualified. This procedure was not followed; the Respondent selected its own personnel and did its own hiring. In regard to Quinones, Fernandez testified: ''She interpreted the contract to mean that she had the authority to hire people. I took that in the conversation when she became very angry was that she thought she had the right to hire employees and I said no, no, no, you have the right to refer employees to me, I'll make the determination of who gets hired.''[18] However, Fernandez testified that Quinones did put ''quite a few people'' on the payroll.

Quinones described to what level PEC's function was reduced,

> All we were doing is supplying them [Respondent's workers] with their paycheck . . . we supplied the hotel with timecards which were to be filled by the employees and signed by the supervisors and by the employee and those time cards would be returning to us weekly and from there we would proceed to . . . [m]ake out the pay checks . . . we would pay them and the hotel would pay us right away.

Quinones testified, ''We proceeded under the instructions of Rodriguez-Estrada.'' ''I don't know what his position was. I know that he was my contact. He was the one I dealt with and you know, as far as I know, he was the decision maker.''

PEC was told who to hire. Quinones testified that Rodriguez-Estrada ''went over the list and told me who was going to be on the payroll.'' According to Fernandez, PEC first believed that it was to do the hiring. According to Fernandez, ''What made PEC unhappy was that I made the final decision as opposed to them making the decision [for hiring]. . . . I was the line on them to locate experienced people.''[19]

During the period of recruiting, Quinones was called from the hotel by the ''girl that was representing the company that worked for us as a recruiter.'' She informed Quinones that ''she had gotten instructions that henceforth, they would be told who would be put on [the] payroll.'' Quinones immediately went to the hotel. She met with Rodriguez-Estrada. Gomez was present. Rodriguez-Estrada gave her a list of employees who were ''going to be put on the payroll.'' Quinones identified this list as General Counsel's Exhibit 18.[20] Some of the employees' names, General Counsel's Exhibit 18, appear on the Respondent's first payroll which was carried by PEC. Quinones testified, ''We accepted applications from all the people but interviews were never executed.''

The predecessor's employees were informed by Rodriguez-Estrada on May 5, 1986, that they were separated from employment and the Respondent would operate with its own personnel.[21]

On May 21, 1986, Rodriguez-Estrada addressed the following memorandum to ''all employees.''

> As is known by all of you, the firm Horizons Hotels Corp. recently purchased the Carib-Inn Hotel. Said enterprise has the intention of operating this hotel with its own management and its own personnel.
>
> Our management and our personnel terminates its duties at this hotel next May 31, 1986. Horizons Hotels begins on June 1, 1986.
>
> For the purposes of recruiting its own personnel, Horizons Hotels has established a recruiting office of its employees at the Lobby of Coral Beach Condominium, Manuel Mercado & Associates' office, at Isla Verde, near the Carib-Inn. Said recruiting center will be opened starting tomorrow, *Thursday until Friday* from *9:00 a.m. to 4:00 p.m.*
>
> I suggest you ask your respective department heads to allow you to fill out your applications for employment as soon as possible, if you are interested in continuing to work at this hotel. As far as we are con-

[16] The enclosure is attached and marked Exh. B.

[17] It is not clear in the record as to why Rodriguez-Estrada made the request but it is clear that photographs would have identified the predecessor's service employees whom the Respondent failed to hire.

[18] From this testimony it would appear that Fernandez, along with Rodriguez-Estrada, participated in the formation of the arrangements with PEC. On June 19, 1985, Quinones addressed a letter to Doel Sanchez, Comptroller, Horizons Hotel, Inc., a part follows:

> Enclosed are invoices with the corresponding charges for services. This also serves to remind you that the matter for the guarantee of the payroll payment is still pending to be solved, this should be resolved within the next few days.
>
> As it had been mentioned in the initial accord, it was agreed that PEC would select the personnel in accordance to its criteria and knowledge in human resources. Contrary to this accord, you selected the personnel and only about 10 from the ones we had interviewed and qualified for these purposes. We understand that in this group of persons recruited by you there are several who are ''non-grata'' and because of circumstances beyond our control, we are unable to dispense with their services, as it would normally occur if we had [sic] complete control of ''our'' personnel. This offers a completely different picture to what was foreseen, as the risk is much more greater than what it should have been if we had had the freedom that we should have with all our personnel. This service is more like a payroll service, more so as we do not have the absolute control of the personnel. We could guarantee the price of $4.85 for persons earning a salary of $3.35 if for this personnel payment for sick leave and vacations is not included. These benefits do not start retroactively until the third month of employment, in accordance with the labor laws.

[19] Fernandez further testified as to the people referred by PEC ''I mean I just interviewed the file from an experience point of view and then I decided which ones we were going to hire and which we were not from PEC.''

[20] The names generally were not names of employees who were working for the predecessor.

[21] However, David Garcia, a holdover who took Ramirez' job as bell captain, testified that he never received a termination letter. Virgilio Quinones Huertas, a holdover who was listed as a houseman on G.C. Exh. 18, testified that he never received a termination letter.

> cerned, I am authorizing the department heads to allow you to carry out such endeavors in an orderly manner. [G.C. Exh. 2(b).]

Quinones described PEC's participation in this endeavor, ''that was another day that I was called to the office and told that Janet, my employee, had to go to a condominium right across the street of the hotel. . . . Coral Beach . . . at a real estate office and that employees from the hotel were going to be able to fill their applications there to solicit employment.'' Quinones visited Coral Beach and observed persons filling out applications. PEC interviewed none of these persons who filled out applications for hotel jobs. After the applications were taken, PEC was told ''who would work and who would not.'' Quinones testified, ''After we got finished there [Coral Beach], we went to the hotel and that's when they picked out the people and we were told what people would work.'' Gomez testified that Janet from PEC handed him two piles of applications and that ''one of them had a rubber band around it and she told [him] that no people from that pile was to be interviewed or was not to be hired.'' PEC did no interviewing of employees.

The credible record establishes that the persons listed in Exhibit C attached hereto placed applications for employment with the Respondent.

Sixth: About 5 or 6 days before the end of May 1986, Rodriguez-Estrada asked Gomez[22] to ''start working on . . . a list of employees that were going to be needed to operate the hotel when Horizons would take over.'' Gomez furnished a list of the number of employees needed in the departments to Rodriguez-Estrada except it did not include the casino and security departments. After Gomez gave the list to Rodriguez-Estrada, a few days later, he gave Gomez ''another computer printout list with some names crossed out,'' 2 or 3 days before before May 31, 1986. These names Gomez recognized as present employees of the hotel.[23] After Gomez received the list ''we start the interviews for the people that was to be hired . . . the people that did file applications at PEC offices.'' According to Gomez, he ''did these interviews. . . . A girl from PEC was sitting next to me all that time but . . . she didn't interview no one of them. . . . We were interviewing people that had been provided by PEC but I did not interview no one at all that used to work [for] the hotel before. Not even one.''[24] None of the predecessor's employees were called for employment interviews. The interviews took place in the ''hotel conference room'' about 3 days before May 31, 1985. ''[T]here were two piles of applications. They both were being handled by the girl from PEC. One of them had a rubberband[25] around it and she told me that no people from that pile was to be interviewed or was not to be hired. She mentioned [that to me] . . . [t]he other pile belonged to people that was staying—waiting to be interviewed. People that was brought into the office or the conference room by PEC. They were called by PEC.''

Rodriguez testified that he had no ''input'' in the hiring of employees for the Respondent. However, he saw the ''list of Mr. Fernandez addressed to Juan Gomez.'' ''Made to select the people who would stay and the ones would not stay.'' According to Rodriguez-Estrada, the criteria Fernandez used for hiring the employees was ''four months walking upon down around the hotel, I think.'' ''[H]e told me that he was taking names and interviewing people. And he was going to make a list of the best employees to be hired by his corporation.'' Fernandez carried ''a notebook'' in his hand. However, Rodriguez had difficulty recalling the names of employees Fernandez interviewed.[26]

Fernandez testified that he ''made that decision [to hire]'' the Respondent's employees. How he came to his decision, Fernandez described:

> I consulted with supervisors that existed at the Carib Inn prior to June 1, 1986. I consulted with some of my associates that had observed employees during that period of time. I reviewed the applications obtained by professional employment census and based on all those things I then came to the conclusion and also under the factor of the number of people that our corporation needed to begin operations, taking into consideration all those factors. I then made the decision of the number of people that were going to be hired and who specifically is going to be hired.

General Counsel's Exhibit 18 is a list of people who were going to be hired. According to Fernandez, he prepared and finalized the list around the ''end of May [1986],'' and delivered it to Gomez.[27] The reason former hotel employees were not hired as explained by Fernandez, ''Because we didn't need all of them. Second, we considered the fact that the hotel had been in bankruptcy for so long that part of the reasons why the hotel was in bankruptcy was that the employees were not tending to the needs of the guests.'' Further testifying, Fernandez stated ''we never really were concerned with the union or not with the union.'' However, Fernandez

[22] I consider Gomez a credible witness.

[23] Some names he recognized and recalled were Julio Vega from the front office, Domingo Morales, and Delia Osorio, telephone operator.

[24] Fernandez testified as follows:

> A. They were given—my recollection is that PEC would give those applications which is what they were to Juan Gomez. Juan Gomez then gave them all to me, not all at the same time but during a few days' period of time I then received all of the applications. [Fernandez also testified that he did not ''personally have knowledge'' of Gomez' interviewing people.]
>
> Q. Okay. What—was there any particular reason why Gomez received those applications?
>
> A. Yeah, because he would either interview those employees that the applications referred to or he would talk to them or he would talk to PEC who had interviewed them.
>
> Q. Okay. And then did Mr. Gomez have occasions to talk to you about what he talked to PEC?
>
> A. Yes, he did.

[25] Fernandez testified:

> Q. What do you recall was, if anything, and what was your participation, if any, in that determination as to who was to be hired or not to be hired?
>
> A. I'm the one who gave him [Gomez] the piles. There were two piles with folders with *a rubberband* around each and I told him that these people are to be hired, these people are not to be hired. [Emphasis added.]

[26] Because Horizons hired none of the predecessor's personnel for jobs in the service unit, it would appear that the pages of the alleged notebook (which did not appear in the hearing) was wanting in ''best employees.''

[27] Fifteen persons on the list appear on the PEC invoice listing 58 employees who worked for the first week after June 1, 1986.

knew there was a union in the hotel. Fernandez testified that around 100 employees worked for Carib Inn at the time of Horizons' takeover. Of these employees, Fernandez testified that he talked to between 30 to 35 at the jobsite. ''At least [he] asked [him] his or her name,'' others he observed, ''It is reduced down to a list that we had given you. Those employees that I finally hired, that was the final work product[28] . . . Exhibit No. 18.'' While Fernandez said he had talked to maids on the floor he could not name one. Some employees he ''hired direct for Horizons Hotel Corporation.''

The credible record reveals that Rodriguez-Estrada, Gomez, Fernandez, and representatives of PEC all participated to some degree in the selection of the employees who filled the Respondent's jobs. Although Fernandez' testimony is somewhat conflicting, Fernandez apparently participated in and ratified the hiring procedure. Nevertheless, it does seem certain that Fernandez was the one who decided to avoid hiring the predecessor's service employees to escape the consequences of union representation.

Virgilio Quinones Huertas, who was a carryover, testified, ''I hadn't known Mr. Fernandez. All I know is Mr. Rodriguez Estrada. He is the one that's my boss. He is the one that gives me the food that I eat.''

Seventh: According to Gomez, Ramon Pantojas was the ''Night Auditor and the Night Manager'' for Carib Inn whose services were continued in the same capacity for the Respondent. Gomez discussed hiring Pantojas with Rodriguez three or four times in May 1986. According to Gomez, Pantojas was ''in charge of the nightly operations while the General Manager and the Resident Manager are not at the hotel.''

According to Domingo Morales, he worked 2 days a week for Pantojas as assistant who assigned him his work and to whom he went to request time off. Gomez testified that Pantojas was in charge of the night shift. From May 18 to 31 Pantojas gave instructions and assigned work.

Felix Ramirez testified that Pantojas was the night manager and ''ordered to have the rooms cleaned.'' Ramirez conversed with Pantojas around May 20, 1986, at the hotel. Pantojas told employees ''Horizons wants no employee that has backed up the Union or is backing up the Syndicate. Because this enterprise does not want [a] Union.'' ''[W]e were going to be thrown out like bags.'' Ramirez also testified that Pantojas told him that ''he was the pet boy of Horizon'' and that ''Rodriguez-Estrada . . . had given him all the authority to check that the union—that the Union members would not infiltrate staying there to work.'' Pantojas denied he made the above statement. His denial is not credited.

Eighth: Maria Isabel DeJesus Rivera, an employee at Carib Inn for around 20 years and delegate for the Union for about 15 years, was a maid in the housekeeping department. In May 1986, about 2 weeks before her discharge, Rodriguez-Estrada told her while she was in the cafeteria that he was celebrating the sale of the hotel and that ''they were negotiating with him for him to stay.'' DeJesus Rivera also testified that she overheard a conversation sometime thereafter in May. ''I have to take the Union out of here,'' and in which Rodriguez-Estrada said, ''I have to take all the 'pendejos'[29] out of here.''

Ninth: Frankie Rosado Garcia (Rosado) was a waiter at the Carib Inn in the La Pinaja cafeteria. He had been the Union's general delegate or steward for around 12 years. While he was in the cafeteria in May 1986, Rodriguez-Estrada said to him ''you betrayed me.'' Thereafter Rosado Garcia went to Rodriguez-Estrada's office where Rodriguez-Estrada said ''if they [the Union] continued to bother him that [I] was going to fire them all [all the workers] and tomorrow he would place a letter in their hand.'' On another occasion in May 1986, Rodriguez-Estrada said ''there was no Union in Puerto Rico that would defend us.''

Tenth: Carlos Gonzalez-Camacho conversed with Rafi Diaz, casino manager, at a time when ''he was going to be the Manager of the Casino. . . . [H]e was hired by the Horizons company to work with them and he was at the hotel in his own office, asking and asking questions about the personnel.''

Gonzalez-Camacho asked Diaz for a job with Horizons when he received no answer to his application. Diaz replied that he ''didn't want me there.'' Gonzalez-Camacho was a union member.[30]

Eleventh: On May 21, 1986, a meeting occurred between Valentin Hernandez (sometimes called Chiro Hernandez), secretary-treasurer of the Union, and General Steward Felix Ramirez, Rodriguez-Estrada, and Gomez. Among other things Hernandez was told by Rodriguez-Estrada that ''anything that [he] would like to talk about the administration of the hotel, [he] had to speak it with or talk about it with Mr. Gomez.'' When leaving, Hernandez was asked to return to Rodriguez-Estrada's office. Rodriguez-Estrada indicated that he was ''going to recommend to Horizon[s] not to employ or hire Mr. Frankie Rosado, and neither Carmelo Caldera, because fellow-worker Carmelo Caldera was too 'jodon' [pest or pain-in-the-ass, troublesome].'' Hernandez asked Rodriguez-Estrada whether this recommendation was because Rosado had been a member of the Union's board of directors and because Caldera was a member of the board of directors. Rodriguez-Estrada ''remained silent.'' Rodriguez-Estrada also informed Hernandez that ''Horizons was going to hire its own employees.''

Twelfth: Felix Ramirez testified that when he talked to Rodriguez-Estrada about going to Coral Beach to file an application for employment, Rodriguez-Estrada said that ''he had authorization to be in charge of selecting the employees.''

Ramirez testified as to what occurred when he was fired:

> On the 31st at 3 o'clock in the afternoon, when I was finishing my shift, Mr. Velazquez was coming in to relieve me. When I came out, a security officer, called Mr. Rosario who was also an intelligence officer for the

[28] Apparently Fernandez' alleged final work product had been ''mostly'' composed prior to the receipt of the applications of the predecessor's employees for he testified:

> Q. Okay. So in other words when you got all the applications from the former Carib Inn employees and when I say former I mean those people that have been, you know, employed during April, May of the Carib Inn, you had already a list of the people that you were, you know, going to employ out of that pack of applications, is that correct?
>
> A. Well, a mostly completed list, not an absolutely finished list but a mostly completed list.

[29] ''Idiot, stupid fool.''

[30] This testimony was proffered by the General Counsel and rejected.

> Police Department of Puerto Rico, together with another security officer, Mr. Martino, gave me my envelope with my wages and they told me that they were very sorry. . . . You are dismissed from the hotel. You have your wages here. Horizons does not want you anymore because you are too faithful to the Union. And they gave me my salary, almost we can say, I had one to each side like if we were prisoners and they ordered me that I could not go back ever again to the hotel because I had embraced the employees on the 29th, when they were fired.

Thirteenth: According to Ruben Davila, when the Union learned that there was going to be a change of ownership it started to collect ''union cards.''

The Question of Jurisdiction

The Respondent asserts that ''the NLRB has no subject matter jurisdiction to oversee the conduct of a trustee in Bankruptcy.'' Thus, the Respondent urges that the Board has no jurisdiction to entertain a suit which involves a trustee in bankruptcy as is the situation in the instant case and that only the bankruptcy court has jurisdiction to adjudge the case.

This contention was decided adversely to the Respondent in the case of *In re Carib-Inn of San Juan Corp*., 905 F.2d 561, 563–564 (1st Cir. 1990). The court opined:

> Furthermore, if the facts warrant a finding that the conduct of the bankruptcy trustee was performed on behalf of the purchaser and amounted to an unfair labor practice, the proposition that an order of the bankruptcy court could protect the purchaser from the consequences under the National Labor Relations Act would be untenable.

The Respondent's objection is not well taken.

The Agency of Rodriguez-Estrada

Section 2(13) provides:

> In determining whether any person is acting as an ''agent'' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The following factors in the credible record establish that Rodriguez-Estrada was an agent of the Respondent.

Rodriguez-Estrada and Fernandez occupied adjacent offices in the hotel and shared a secretary; they were seen together at the hotel many times; Rodriguez-Estrada hired Gomez with Fernandez' approval as resident manager for the Respondent's operation; employees were informed that Fernandez approved Gomez' appointment; Rodriguez-Estrada procured PEC and worked out the details with Fernandez' apparent approval for PEC's recruitment and hiring of workers for the Respondent's hotel operation and the placement of them on PEC's payroll; the interviews of employees for jobs were conducted in the hotel conference room where they could have been observed by employees; Rodriguez-Estrada requested Quinones to come to the hotel on several occasions and to participate in the solicitation of work applications of the predecessor's employees; Rodriguez-Estrada participated in the selection of supervisors who were hired by the Respondent; Rodriguez-Estrada asked Gomez to ''start working on . . . a list of employees that were going to be needed to operate the hotel when Horizons would take over''; Rodriguez-Estrada gave Gomez a list of applicants to be hired by Horizons; the Respondent offered Rodriguez-Estrada a job as a consultant and then general manager of the hotel; employees believed that Rodriguez-Estrada would continue in the employment of Horizons as he did, although Fernandez must have known that the observations of employees and others of Rodriguez-Estrada's activity would have lead them to believe that Rodriguez-Estrada was acting for the Respondent, Fernandez did nothing to disavow the Respondent's connection with Rodriguez-Estrada.

The fact that Rodriguez-Estrada was also acting as a trustee in bankruptcy is immaterial. See *In re Carib-Inn of San Juan*, supra.

I find that Rodriguez-Estrada was an agent of the Respondent and that the Respondent was bound by his acts as detailed. See *Lemay Caring Center*, 280 NLRB 60 (1986), enfd. sub nom. *Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987).

Rodriguez-Estrada as an agent acted as much more than a conduit for information; his activities allied him to and made him part of management. Cf. *LTV Electrosystems*, 169 NLRB 532, 534 (1968). The credible evidence is that Rodriguez-Estrada was acting on behalf of Horizons; there is no credible evidence that he was acting independently on behalf of himself or as trustee in respect to matters herein detailed which relate to the Respondent. Nor was his posture as an agent ever disavowed by the Respondent to Quinones, Gomez, the employees, or any others. His efforts on its behalf were accepted, ratified, and implemented by the Respondent.[31]

The Supervisory and Agency Status of Pantojas

A ''supervisor'' is defined in Section 2(11) of the Act as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The law on the subject is well summarized by Administrative Law Judge Itkin in the case of *Amperage Electric*, 301 NLRB 5 (1991):

> Actual existence of true supervisory power is to be distinguished from abstract, theoretical or rule book authority. It is well established that a rank and file employee cannot be transformed into a supervisor merely by investing him or her with a ''title and theoretical power to perform one or more of the enumerated func-

[31] The scheme Rodriguez-Estrada worked out with Quinones to avoid hiring the employees who had been covered by the service unit contract was adopted and implemented by the Respondent.

> tions.'' *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (C.A. 4, 1958), cert. den. 359 US 911 (1959). What is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also ''states the requirement of independence of judgment in the conjunctive with what goes before.'' *Poultry Enterprises, Inc. v. NLRB*, 216 F.2d 798, 802 (C.A. 5, 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some supervisory tasks in a merely ''routine,'' ''clerical,'' ''perfunctory'' or ''sporadic'' manner does not elevate a rank and file employee into the supervisory ranks. *NLRB v. Security Guard Service, Inc.*, 384 F.2d 143, 146–149 (C.A. 5, 1967). Nor will the existence of independent judgment alone suffice; for ''the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act.'' See *NLRB v. Brown & Sharpe Manufacturing Co.*, 169 F.2d 331, 334 (C.A. 1, 1948). In short, ''some kinship to management, some empathetic relationship between employer and employee, must exist before the latter becomes a supervisor of the former.'' *NLRB v. Security Guard Service, Inc.*, supra.

The following factors establish that Pantojas was a supervisor within the meaning of the Act.

Gomez testified that Pantojas was in charge of the night operations; he was the only person present representing the Employer; he exercised the highest supervisory authority over the night workers; employees worked under his direction; he assigned work; and he granted time off to employees.

I find that Pantojas was a supervisor within the meaning of the Act. I do not find that the credible evidence establishes that Pantojas was an agent of the Respondent prior to June 1, 1986.

Alleged Violations of Section 8(a)(1)

A. *Complaint Paragraph 11(a)*

The allegations of paragraph 11(a) are planted on the alleged misconduct of Pantojas which occurred prior to June 1, 1986. Because I have found that Pantojas was not an agent of the Respondent prior to June 1, 1986, I dismiss the allegations in paragraph 11(a).

B. *Complaint Paragraph 11(c)*

Paragraph 11(c) alleges that the Respondent, acting through Rodriguez-Estrada, unlawfully threatened to discharge employees.

This allegation is planted on Rodriguez-Estrada's statement to an unidentified person overheard by DeJesus to wit; ''I [had] to take all the 'pendejos'[32] out of here'' and ''I have to take the Union out of here.'' Rodriguez-Estrada's words were apparently addressed to an unidentified person. Because there is no proof that the remarks were addressed to an employee or that the speaker was aware that an employee was listening or that he would have reason to believe that his remarks, as uttered, and to whom uttered, would have a tendency to coerce, restrain, or interfere with employees' Section 7 rights, I dismiss paragraph 11(c).

[32] ''Pendejos'' according to the interpreter meant idiot, stupid, or fool.

C. *Complaint Paragraph 11(d)*

This paragraph alleges that Rodriguez-Estrada created an unlawful impression of surveillance and threatened employees with unlawful discharges. This allegation is based on the following statement contained in the affidavit of Milagros-Rivera dated September 2, 1986, the content of which she could not remember:

> Rodriguez answered that he was also going to sign a deed and showed me a check for $36,000 and some papers where there were several signatures. Mr. Rodriguez also remarked, ''I do not stay as owner, but I stay as director of the hotel.'' That the employees who signed cards, he added, ''he was going to screw.'' When he said this remark I defended the casino fellow workers, reminding him that those in the casino had not signed cards. Mr. Rodriguez then told me that he had a list of those who had signed cards.

The affidavit was offered by the General Counsel as past recollection recorded. It was rejected. Because there is no proof in the record to support the allegations, I dismiss paragraph 11(d).

D. *Complaint Paragraph 11(e)*

In this paragraph it is alleged that through Rodriguez-Estrada the Respondent created an unlawful impression of surveillance, unlawfully threatened employees, and denigrated the Union by making derogatory statements about the Union.

The facts offered to support this allegation are as follows:

> Frankie Rosado Garcia, herein referred to as Rosado, was an employee of the predecessor and worked as a waiter at La Pinaja, the cafeteria. Rosado was a steward. Around May 12 or 13, 1986, the president of the Union was seated in the cafeteria. Rosado testified ''When I finished with the President of the Union I went towards the cashier. And then he [Rodriguez-Estrada] went by me and he said, 'aha, you betrayed me.''' Later in the day Rosado went to Rodriguez-Estrada's office. ''I asked him why he said that I had betrayed him. And he said Diaz [the Union's president] had come to stop the hotel. And I said to him no, that he had only come because of the election. And then he told me that if they continued to bother him that he was going to fire them all [the workers] and tomorrow he would place the letter in their hand.''

Thereafter, in May, Rosado conversed again with Rodriguez-Estrada in La Pinaja. Rosado testified:

> I remember that Mr. Rodriguez-Estrada came to the room to eat, that he usually came in to eat. And how are the elections, and I said that they were all right. And then he said that the Union was not backing us. And I said why not. Then he told us that if he would have been the one for the Union, he would have gotten for us what was owed to us from the Federal Court. He said that there was no Union in Puerto Rico that would defend us. That was the conversation that we had at that table . . . he said that our Union did not back us. . . . I told him that he was not the President of the Union and then I went to the kitchen to serve him his meal. . . . He told me that if he would have been the President of the Union he would have gotten for us all the money that was owed to us from the Federal Court.[33]

The General Counsel asserts in his brief at 26 and 27:

> Rosado's testimony reveals that, by Rodriguez-Estrada's comment that he (Rosado) was betraying him, moments before Rosado was speaking with Union president Diaz, Rodriguez-Estrada created the impression in the eyes of employee Rosado, that Rodriguez-Estrada was engaging in surveillance of the employees' Union activities. On the same day, Rodriguez-Estrada's statement to Rosado that if the employees continued to bother him, he (Rodriguez-Estrada) was going to fire them constituted an unequivocal threat of discharge because of the employees' support for the Union, because it came in response to Rosado's association with Union president Diaz, as Rodriguez-Estrada observed. Prisoner Rodriguez-Estrada admitted that he had lots of conversations with Rosado.
>
> Thereafter, Rodriguez-Estrada's statement to Rosado that the Union did not back them up, that the Union should have obtained certain monies for the employees and that there was ''no Union that could defend them'' was calculated to denigrate the Union before the eyes of its employees-members and to distance the employees from the Union, suggested futility in Union membership or Union support and dissuaded employees from continued membership in and support for the Union. Rodriguez-Estrada's statement ''you betrayed me'' could reasonably have led Rosado to assume that his Union's activities had been placed under surveillance specifically because of the timing of the remarks. *Rood Industries*, 278 NLRB 160, 164 (1986). Because Rodriguez-Estrada had been endowed with apparent authority to act on behalf of management, the Respondent violated Section 8(a)(1) also by threatening to fire Union supporters. *National Gypsum Co*., 293 NLRB 1138, 1143 (1989). Likewise, Rodriguez-Estrada's demeaning statements to denigrate the Union in the eyes of the employees violated Section 8(a)(1) of the Act. Cf. *Lehigh Lumber Co*., 230 NLRB 1122, 1125 (1977).

I am in agreement with the General Counsel and find that by the Respondent's agent Rodriguez-Estrada's remarks to employee Rosado, the Respondent violated Section 8(a)(1) of the Act.

[33] The testimony of Rosado is credited.

The test is ''whether the threatened conduct has the tendency to interfere with, restrain or coerce the employees in the exercise of their Section 7 rights.'' *Cox Fire Protection*, 308 NLRB 793 (1992).

E. *Complaint Paragraph 11(f)*

In this paragraph it is alleged that the Respondent, through Rodriguez-Estrada, threatened to unlawfully discharge employees because they engaged in activities on behalf of the Union.

Felix Ramirez[34] testified that he engaged in conversation with Rodriguez-Estrada in Rodriguez-Estrada's office on May 21, 1986. Chiro Hernandez, union secretary-treasurer, was present. They wanted to know why the employees would have to go to Coral Beach to fill out applications. Rodriguez-Estrada responded, ''I have nothing to talk with you because you don't represent anybody. I don't have to talk to you anything about [the] Union.'' Addressing Ramirez, Rodriguez-Estrada said, ''[W]hat is Mr. Ramirez doing in this office. He no longer represents the employees because the Union is out.'' To Hernandez Rodriguez-Estrada said, ''Horizons ha[d] nothing to do with the Union Gastronomica.'' Ramirez further testified:

> Then he didn't want to comment anything else with us. Mr. Hernandez told him if you do not listen to me, I thank you but I am going to go to the Secretary of Labor of the Commonwealth of Puerto Rico because those that I represent have a complaint. When we turned our backs, he said don't go, you can talk as friends but not as the representatives of any Union.

Gomez was present. Rodriguez-Estrada pointed at Gomez and said that ''he represented Horizon.''

Valentin Hernandez remembers:

> [W]hen I knocked at the door accompanied by fellow-worker Ramirez, I told him that I wanted to talk to him regarding certain irregularities that were occurring at the hotel. And in regard to the memo that he had sent to the workers dated May 21, 1986.
>
> He told me that he did not have to receive me as a representative of the Union . . . since the Union no longer existed, but that he could receive me as a friend.
>
> I told him that if he did not want to receive me it was all right with me and I would leave.
>
> We went into the office—finally he did receive me, and we started talking about the memo.
>
> . . . .
>
> The memo dated May 21, 1986. Mr. Gomez was there and he introduced me to him.
>
> He told me that Mr. Gomez was a representative of Horizons at the hotel. And that anything that I would like to talk about the administration of the hotel, I had to speak it with or talk about it with Mr. Gomez. . . . I told Mr. Estrada and Mr. Gomez that my intention and wish was to meet with Mr. Ben Fernandez to discuss all the atrocities that were occurring at the hotel with regard to the dismissal of each and every one of the employees. . . . Before I left, when I said I am

[34] Ramirez is credited as to these events.

> leaving, Mr. Gomez told me that he would be in charge of making the arrangements so I and Mr. Ben Fernandez could meet.

After Hernandez left on request he returned. On this occasion Rodriguez-Estrada told Hernandez that ''he was going to recommend to Horizon not to employ or hire Mr. Frankie Rosado, and neither Carmelo Caldera, because fellow-worker Carmelo Caldera was too 'jodon.'''[35]

Hernandez asked Rodriguez-Estrada whether he was going to take such action because these employees were or had been on the Union's board of directors. According to Hernandez, Rodriguez-Estrada ''remained quiet.''

The General Counsel claims that Rodriguez-Estrada's ''threat that he would recommend to Horizons not to hire known Union leaders Caldera and Rosado on the heels of his prior statement, constituted a violation of Section 8(a)(1) of the Act by telling the employees' representatives that those who engaged in union activity would not be hired.'' The General Counsel relies on *J. D. Landscaping Corp*., 281 NLRB 9, 11 (1986). That case, however, concerns informing employees that they would not be hired for engaging in union activity. The instant case involves statements made to a union representative. I find no violation of Section 8(a)(1). Paragraph 11(f) is dismissed.

Alleged Violations of Section 8(a)(3)

Once the General Counsel has shown by a preponderance of the evidence that the employees' union affection or the Respondent's unlawful desire to avoid the bargaining obligation to recognize and bargain with the Union were motivating factors in its decision to refuse to consider an employee for employment, the burden shifts to the employer to show that it would have failed or refused to give the employee employment even if the employee had not shown union affection or suspected union affection or the employer had not entertained antiunion motives. Cf. *Wright Line*, 251 NLRB 1083 (1980).[36]

The following factors and inferences support the General Counsel's prima facie case.

Rodriguez-Estrada, prior to June 1, 1986, acted as an agent for the Respondent.

The Respondent's antagonism against the Union and its antiunion animus are evident in Agent Rodriguez-Estrada's statement to Quinones ''he would try to do business with us if he could pretty much be guaranteed that there would be no risk of having a union'' and ''[p]ut it in writing'' that there was ''no possibility [of] a union.''

The Respondent's antiunion animus is further self-evident and inferred in that the Respondent did not choose one predecessor employee for employment in the service unit which had been a union-represented unit.[37] Rodriguez-Estrada ''made [PEC] get photographs of every person that solicited, attached to the . . . application, so he would recognize [the] people,'' creating the inference that the Respondent wanted to finger the predecessor's employees.

In Quinones' resume of her discussion with Rodriguez-Estrada on April 3, 1986, appears the language ''There is no possibility of a union'' further manifesting Horizons' antiunion animus and its desire to avoid the Union.

Rodriguez-Estrada worked out a scheme for the Respondent (of which obviously Fernandez was aware, participated in, and condoned) for hiring and paying Horizons' workers, who actually went to work for Horizons as permanent employees, by putting them on a PEC payroll as temporary employees ostensibly because temporary employees, as Quinones represented, were nonunion employees, and for the purpose of avoiding charges of discrimination or any bargaining obligation.

Horizons sought to fence out the Union by hiring ''alleged'' temporary employees under the PEC umbrella although the employees hired were of a permanent nature.

Rodriguez-Estrada, Fernandez, Gomez, and PEC, in some degree, participated in the scheme of hiring and putting Horizons' workers on PEC's payroll as temporary employees which included no predecessor employee to be hired in the service unit.

Nevertheless, although it appeared that Fernandez' list of employees to be hired had already been prepared, Rodriguez-Estrada informed the predecessor's employees to file applications with Horizons Hotel at the lobby of Coral Beach Condominium (Rodriguez-Estrada ''had the authorization to be in charge of selecting the employees'') which creates the inference that Rodriguez-Estrada's notification to the predecessor's employees was subterfuge to create an appearance that the predecessor's service employees were being considered for jobs.

Although PEC took the applications for employment for the predecessor's employees at the Coral Beach Condominium, none of these employees were interviewed for jobs or called for interviews. Their applications were separated from other job applicants by Fernandez.

Proof was that the predecessor's employees listed on Exhibit C filed applications or offered themselves for employment but were never offered employment.

Only supervisory and managerial employees were chosen by Rodriguez-Estrada from the predecessor's employees who were carried on Horizons' payroll.

Pantojas told employees, ''Horizon wants no employee that has backed up the Union or is backing up the Syndicate, [b]ecause this enterprise does not want [a] union'' and that Rodriguez-Estrada had given him ''all the authority to check that the Union—that the [u]nion members would not infiltrate staying there to work.''

Rodriguez-Estrada was heard to say ''I have to take the Union out of here,'' and ''I have to take all the 'pendejos' out of here.''

Rodriguez-Estrada told an employee ''if they [the Union] continued to bother him that he was going to fire them all [all workers] and tomorrow he would place [a] letter in their hand.''

Rafi Diaz, casino manager, told a union member, when he inquired about his job application, that he ''didn't want me there.''

---

[35] ''Jodon'' according to the dictionary to which the interpreter referred, meant ''to fuck, to pester, . . . to get on his nerves, to annoy, to be a drag, to bugger up, to mess up, to ruin.''

[36] Because the units were covered by a union contract, presumptively the employees would have continued to support the Union.

[37] It is also inferred from the pretextual nature of the reasons for the discharges advanced by the Respondent that the Respondent was motivated by union hostility. *Whitesville Mill Service Co.*, 307 NLRB 937 (1992).

Although service unit employees were carried on PEC payroll, Horizons controlled their conditions of employment.

There is no credible proof that any predecessor employee's application was reviewed for employment which, assuming arguendo that such had occurred, common sense and mathematical improbability dictate that not every service unit employee would have been found wanting. The Respondent's choice of nonunion employees was deliberate and contrived.

The same persuasion which inclined Horizons to pass over service unit employees carried over to the casino employees.[38]

The Respondent justifies its action with this explanation as related by Fernandez:

> All of them? Because we didn't need all of them. Second, we considered the fact that the hotel had been in bankruptcy for so long that part of the reasons why the hotel was in bankruptcy was that the employees were not tending to the needs of the guests.
>
> Q. Well, how do you know that sir?
>
> A. Well, one I know from personal observation. Two, I know it's just a matter of logic that the hotel had been in bankruptcy for so long that there needed to be a change of certain people so that it would function better and it would make money.
>
> JUDGE GOERLICH: You were eliminating the dead ones,[39] is that it?
>
> THE WITNESS: Yes, sir.

The speciousness of such reasoning is obvious. The Respondent asserts that the service personnel were a cause of the prior operator's bankruptcy but submits no definite credible proof. Moreover, Fernandez, although he allegedly observed the service employees, did not point to one department or an individual employee, which in his scrutiny he found to be deficient in fulfilling duties. Nor was there any credible proof that the persons put to work were more qualified or had better records than the predecessor's employees. ''Logic'' would seem to dictate that in the unskilled job classifications in the service unit, seasoned, qualified employees would have been more advantageous employees than new unfamiliar employees.[40]

Incongruously, the Respondent hired a substantial number of supervisory, administrative, and managerial employees including Rodriguez-Estrada who had managed these ''certain people'' and ''dead ones'' for around 6 months without taking action. Horizons also hired Gloria Pantojas as personnel director; Efrain Guzman as storekeeper; Ramon Pantojas as night auditor; and others. Because the individuals hired by the Respondent apparently had been unable to induce the employees working under them to meet Fernandez' standards, there seems no ''logical'' reason for hiring such apparant inefficient persons to run the hotel and bypass the service employees. Indeed it appears more ''logical'' that management might have been a cause of the bankruptcy rather than the work habits of service employees.

The reasons advanced by Fernandez do not stand scrutiny and are contrived and implausible. Support for a finding of an unlawful motivation is ''augmented [when] the explanation for discharge offered by the [R]espondent [does] not stand . . . scrutiny.'' *NLRB v. Bird Machine Co.*, 161 F.2d 589, 592 (1st Cir. 1949).

In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941), it was stated:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

Horizons' use of PEC's temporary payroll for the purpose of creating the appearance that Horizons' workers were only temporary employees was a coverup contrived so that it would appear that PEC overlooked the service employees and Horizons was not the cause of any discrimination. The credible facts surely reveal that PEC was brought into the picture for the purpose of placing the fault on PEC and affording the Respondent a means of legitimacy while permitting it to ignore, deliberately, for employment the service employees who had been employed in a union-represented unit. Employees who were hired and who were overlooked could not fail to get the message from the Respondent's misconduct that the Respondent would have no union in its hotel. Thus, they were discouraged in the exercise of their Section 7 rights.

The Respondent's machinations reveal its antiunion animus and reveal the kind of conduct which carries with it ''unavoidable consequences which the employer not only foresaw but which he must have intended'' and thus bears its own ''indicia of intent.'' Cf. *Erie Resistor Corp. v. NLRB*, 373 U.S. 221, 228, 231 (1963). See also *NLRB v. Great Dane*, 388 U.S. 26 (1967).[41] It was the kind of conduct that is ''inherently destructive'' of important employees' rights. The Respondent's scheme hindered future bargaining, discouraged union affection, and created obstacles to future exercise of Section 7 rights.

I find that the Respondent refused to consider the predecessor's employees because they had been employees in a unit which had been covered by a union contract and were presumptively for the Union and because it wanted to avoid

[38] In the casino, the union problem was not as acute as in the service unit because the probability was that the casino would be closed, which occurred.

[39] It appears to be that it would have been a mathematical improbability that ''certain people'' and ''dead ones'' would include all the employees in the service unit which would have been covered by the contract and not one would have been a fit employee for the Respondent or that Fernandez would have found no ''best employees'' of whom, according to Rodriguez-Estrada, Fernandez was making a list.

[40] This language of the Board seems apropos: ''We find it reasonable to infer that it was not just coincidental that all those applicants who displayed union affiliation were refused employment while those who were hired did not display union affiliation.'' *Fluor Daniel*, 304 NLRB 970 (1991).

[41] The Board had said in *Texaco, Inc.*, 285 NLRB 241, 246 (1987): ''under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be 'inherently destructive' of important employee rights or motivated by antiunion intent.''

bargaining with a collective-bargaining representative of its employees.[42] The Respondent has not demonstrated by credible evidence that irrespective of the discriminatees' union connections and its antiunion considerations, it would not have hired any of the predecessor's service employees. See *Wright Line*, 251 NLRB 1083 (1980). The Respondent has shown no ''legitimate objectives'' for its actions.

The Respondent did not explain with any credible evidence why the workers chosen to be employed at its hotel were better qualified or would have been superior employees to those which it rejected. Common sense would verify that at least *some* of the long-term experienced employees who had been working in the hotel would have been equally qualified. See *Fluor Daniel*, supra.

This language from the case of *Columbus Janitor Service*, 191 NLRB 902, 910, 911 (1971), is apropos:

> First: It is well settled that Allied's employees were entitled to be considered by Columbus for employment on a nondiscriminatory basis. *Tri-State Maintenance Corp. v. NLRB*, 408 F.2d 171 (C.A.D.C). The Respondent's duty in this regard obtained even though Columbus was not a successor in law of Allied for an employer may not refuse a person employment because of his union affection. *Phelps Dodge Corp. v. NLRB*, 383 U.S. 177.
>
> Prior to the hiring of any new employees for the Friendship site, the union affection of Allied employees was brought to the attention of Columbus by Local 587. Nevertheless, as is established by the credible proof, the Respondent considered none of Allied's employees for prospective employment, although it hired new employees who exceeded the Allied employees in number. To permit an employer to pretermit his predecessor's employees' reasonable expectations of employment without justifiable explanation is but to cater to that employer who ''might well seek to avoid application of the successorship principle by refusing to hire the seller's employees.'' Indeed, if successorship is to have any legal significance in fact such pretermission cannot be tolerated for to tolerate it is to put in the hands of the employer the power to destroy the successorship principle as it has evolved in the law of labor relations and to deprive the employee of the protection which the principle affords the employee when there is a sudden change in his employment relationship. It is well established that ''the interests to be protected [under the Act] are primarily those of employees. . . .'' *Philip Carey Manufacturing Company v. NLRB*, 331 F.2d 720, 735 (C.A. 6). With the employees in mind, the Supreme Court has said in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549:
>
> > The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by *some protection to the employees from a sudden change in the employment relationship*. [Emphasis added.]
>
> ''Some protection,'' it seems clear, at least contemplates the duty for an arguable successor employer who hires employees to consider a predecessor's employees for hire on a nondiscriminatory basis. Where the predecessor's employees are prounion and the employees hired are nonunion, the failure of the arguable successor employer to consider any of the predecessor's employees for employment creates a strong presumption of unlawful discrimination. . . . In this regard the Respondent explained that Allied employees were passed over because the Respondent sought new employees in the belief that they would not have to unlearn a prior employer's work methods and would, without such inhibition, adapt more readily to the Respondent's work methods. The apocryphal character of such claim is self-evident for the Respondent did not interview a single Allied employee to ascertain whether he or she possessed bad habits or whether he or she would adapt to the Respondent's work methods, although it knew Allied employees were available for employment.

There is no credible evidence that the casino employees were not selected in the same manner as the service unit employees.

The Respondent's reason for refusing to hire its predecessor's employees as detailed was a pretext woven from the same cloth as its scheme described to avoid the Union and its bargaining obligations.[43] The reason stated by Fernandez for not hiring the predecessor's employees was false.

By failing to consider for hiring and failing to hire employees of its predecessor, the Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> Unit A:
>
> *Included*: All employees employed by Respondent at its Hotel in Isla Verde, San Juan, Puerto Rico, in the following departments; Housekeeping, food and beverage (including food and beverage checkers and cashiers), repair and maintenance, laundry and valet, pool (including lifeguards), storekeeping, uniform service,

[42] ''[T]o the extent that there is uncertainty with respect to what Respondent would have done absent its unlawful purpose, such uncertainty must be resolved against the Respondent since it cannot be permitted to benefit from its unlawful conduct.'' *Honda of Hayward*, 307 NLRB 340 (1992).

[43] See *Limestone Apparel Corp*., 255 NLRB 722 at 722 (1981). ''[A] finding of pretext necessarily means that the reasons advanced by the [Respondent] either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.''

telephone department employee, employees in the administrative and general department, front office employees, office clerical employees, and secretaries.

Excluded: Executive personnel, professional personnel, pool manager, security employees, comptroller or auditor, assistant comptroller or assistant auditor, night auditor, accounts payable supervisor, accounts receivable supervisor, credit manager, timekeeper, personnel director, Tennis Professional, Assistant Tennis Professional, front office manager, Head Cashier Checker, head front office cashier, head food and beverage cashier (both day and night), payroll supervisor, head of storerooms and receiving, food and beverage comptroller, assistant food and beverage comptroller, assistant manager and maitre d' of the banquet office, executive chef, assistant maitre d', and the secretaries to manager, personnel director, comptroller or auditor, food and beverage manager, room division manager, sales manager and banquet manager, assistant payroll supervisor, guards and supervisors as defined in the Act.

Unit B:

Included: All croupiers, apprentice croupiers and casino attendants employed by Respondent at the Hotel.

Excluded: All office clerical employees including cashiers, all other employees, professional personnel, guards and supervisors as defined in the Act.

4. At all times material, the Union has been the exclusive representative of all the employees in the above units for the purpose of collective bargaining within the meaning of Section (9) of the Act.

5. By failing and refusing to recognize and bargain with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

7. By failing and refusing to hire the employees listed in Exhibit C, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

8. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. It is further recommended that the Respondent be required to recognize and bargain with the Union in the service unit and the casino unit. In that the casino unit no longer exists, it is recommended that the Respondent recognize and bargain with the Union for the casino unit when and if the Respondent again operates a casino on the hotel premises and that the Respondent offer employment to the casino employees listed on Exhibit C in accordance with their seniority. It having been further found that the Respondent unlawfully discriminated against the service employees listed in Exhibit C it is recommended that the Respondent, in accordance with Board policy, offer them employment to the same positions at which they would have been employed under the terms of the contract between the Union and Carib Inn which was terminated on March 20, 1986, in accordance with the seniority therein declared, or if such positions no longer exist to substantially equivalent positions, without prejudice to the seniority or other rights and privileges they may have acquired, dismissing, if necessary, any employees employed since June 1, 1986, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date they would have been respectively employed by the Respondent had it not discriminated against them to the date of an offer of employment, less net earnings during the period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In that the Respondent's unfair labor practices were committed at least by June 1, 1986, it is recommended that the Respondent's obligation to bargain with the Union commence on June 1, 1986.[44]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

The Respondent, Horizons Hotel Corporation d/b/a Carib Inn of San Juan, Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO or any other labor organization by discriminatorily refusing to hire applicants for employment or by unlawfully discriminating in any other manner in regard to their hire, tenure, or terms and conditions of employment.

(b) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO as the exclusive representative of its employees in the following appropriate units:

Unit A:

Included: All employees employed by Respondent at its Hotel in Isla Verde, San Juan, Puerto Rico, in the

[44] See *Franklin Parish Broadcasting*, 222 NLRB 1133 fn. 2 (1976), in which it is stated, ''We further find that the bargaining order entered into herein by the Administrative Law Judge should commence as of the date on which the Respondent embarked on its clear course of unlawful conduct, December 10, 1974, since the Union had already achieved majority status by that date. *Trading Port, Inc*., 219 NLRB [298] (1975).'' See also *Crown Cork & Seal Co*., 308 NLRB 445 (1992).

[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

following departments; Housekeeping, food and beverage (including food and beverage checkers and cashiers), repair and maintenance, laundry and valet, pool (including lifeguards), storekeeping, uniform service, telephone department employee, employees in the administrative and general department, front office employees, office clerical employees, and secretaries.

Excluded: Executive personnel, professional personnel, pool manager, security employees, comptroller or auditor, assistant comptroller or assistant auditor, night auditor, accounts payable supervisor, accounts receivable supervisor, credit manager, timekeeper, personnel director, Tennis Professional, Assistant Tennis Professional, front office manager, Head Cashier Checker, head front office cashier, head food and beverage cashier (both day and night), payroll supervisor, head of storerooms and receiving, food and beverage comptroller, assistant food and beverage comptroller, assistant manager and maitre d' of the banquet office, executive chef, assistant maitre d', and the secretaries to manager, personnel director, comptroller or auditor, food and beverage manager, room division manager, sales manager and banquet manager, assistant payroll supervisor, guards and supervisors as defined in the Act.

Unit B:

Included: All croupiers, apprentice croupiers and casino attendants employed by Respondent at the Hotel.

Excluded: All office clerical employees including cashiers, all other employees, professional personnel, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the persons listed in Exhibit C immediate employment to the same positions they would have held under the terms of the aforesaid contract between the Union and Carib Inn had they been lawfully hired or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any employees hired since June 1, 1986, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision and to otherwise comply fully with the remedy.

(b) On request, bargain collectively with Union de Trabajadores de la Industria Gastronomica de Puerto Rico, Local 610, Hotel Employees and Restaurant Employees International Union, AFL–CIO as the exclusive representative of its employees in the bargaining units found appropriate, bargaining to commmence as of June 1, 1986.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the reinstatement rights and amounts of backpay due under the terms of this Order.

(d) Post at its Carolina, Puerto Rico hotel copies of the attached notice in Spanish and English, marked ''Appendix D.''[46] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HORIZONS HOTEL CORPORATION D/B/A CARIB INN OF SAN JUAN

and Case No. 24–CA–5423

UNION DE TRABAJADORES DE LA INDUSTRIA GASTRONOMICA DE PUERTO RICO, LOCAL 610, HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL–CIO

ORDER CONDITIONALLY APPROVING WITHDRAWAL REQUEST

PURSUANT TO SETTLEMENT AGREEMENT

The instant matter was closed for hearing purposes on March 15, 1991, and the current expiration date for the filing of briefs is October 5, 1991.

The General Counsel having taken the position that the unfair labor practices alleged in the Complaint and Notice of hearing issued by the Regional Director on December 21, 1987, as amended, were committed, among others, by Hector Rodriguez-Estrada, while acting as agent for the Respondent,

The Respondent having taken the position that Rodriguez-Estrada was not an agent of Respondent during the time material herein and that, in any event, his conduct here cannot be disassociated from his functions as Trustee in Bankruptcy for the predecessor's estate,

The preponderance of the proffered evidence at the hearing tending to show that Rodriguez-Estrada did engage in the unlawful conduct charged in the Complaint and that but for Rodriguez-Estrada's conduct, the allegations contained in the instant Complaint against Respondent would not have been made,

The Respondent and Charging Party wishing to settle their differences in the instant matter in an amicable fashion, procuring to remedy the alleged unfair labor practices and to proceed with business as usual,

The Respondent and Charging Party having, in fact, reached a private settlement which includes, inter alia, recognition of the Charging Party as the exclusive collective bargaining representative for its employees in the hotel, the actual execution of a three-year collective bargaining agreement based on Respondent's prevalent wages, salaries and other economic terms and other monetary conditions of employment, with a reopener clause for wages after one year, the offer of reinstatement for the alleged discriminatees and a negotiated backpay amount for each discriminatee, and negotiate a medical plan acceptable to both parties,

The Charging Party having filed before me a conditional withdrawal request of the underlying charge here,

IT IS HEREBY ORDERED that said withdrawal request is conditionally approved based on the representation that a private settlement has been reached between the parties.

IT IS FURTHER ORDERED that said approval is conditioned on the performance of the undertakings in the private settlement between Charging Party and the Respondent and that on application by the Charging Party or Respondent that those undertakings have not been complied with, the charge will be subject to reinstatement for further proceedings or dismissal as the case may be.

Upon final compliance of such undertakings by the Respondent and Charging Party, counsel for the General Counsel will file a Motion before me informing accordingly and at that time I will enter an ORDER dismissing the Complaint.

Dated at Hato Rey, Puerto Rico, this 23rd day of August 1991.

/s/ Lowell M. Goerlich
Administrative Law Judge

EXHIBIT B

$4. 85 per hour costs for employees of $3.35 [sic] which cost it $4.54 without administrative costs.

Consider the following factors:

It does not need a personnel director who might well earn a salary of 1,500 monthly or 18,000 annually, in addition to an office clerk, and a person to handle the payrolls which might add up to some $1,000.00 between the two.

Let's take also into account the following particulars:

1. There is no possibility for a Union.

2. There is no need to incur in administrative expenses for interviews and evaluations for the purpose of hiring.

3. There are no classified ads expenses.

4. Hiring is carried out in a hushed-up fashion.

5. There is no need to keep employees working when in fact they are not needed (the employee is to be utilized when there is a need for it).

6. There is no need to keep inefficient employees at any time.

7. Compensation does not have to be paid when an employee is fired.

8. Maternity leave does not have to be paid.

9. Money derived from premiums on account of Workmen's Compensations policies are not to be paid or kept tied up, which would pay $14,700.00 approximately annually and in advance, for approximately 88 persons at $3.35.

10. They do not have to file Social Security and Federal returns.

11. They do not risk any increase in their policies due to claims made upon.

12. Fringe benefits do not have to be paid.

13. There is no obligation to pay *non*-working days.

14. Investment is 100% deductive for the Income Tax operational costs.

15. You will only pay for hours worked. If a task is performed one day within 5 hours instead of 8, that employee cannot finish it in 5 hours.

16. You do not have to worry over the accident claims related to work.

17. We will provide employees to avoid overtime in accordance with your needs.

We will interview and qualify personnel for you, according to your specifications and requirements.

We will verify the employment references as well as request from them health certificates (when it is deemed necessary) and of Good Conduct for the Police.

We will offer seminars on motivation, attitudes, physical appearance in accordance to the needs, without any cost on your part.

We will pay the employees on a weekly basis, on holiday, after the Payroll Sheet signed by you has been turned in.

We will keep control of vacations and same will be paid when due without any need for you to keep this control.

If you wish to grant a raise to someone, you can contact us and we will make arrangements.

You may be to pay the whole payroll, including the casino employees—as long as said employees possess a license and qualify for the respective ''Bonding'' insurance.[1]

[1] This is a kind of resource that could not easily be fabricated. I find it to be genuine.

EXHIBIT C

Margarita Claussell	Carmen Ojeda
Maria Caldero	Frank Rosado
Mineroa Vazquez	Ramon Luis Rosario
Tomasa Garcia	Blas Ortiz
Beatriz Hiraldo	Jose Justiniano
Tomasina Zapata	Raul Velazquez
Candida Santana	Julio Rodriguez
Carmen M. Colon	Orlando Trinidad
Isabel Rodriguez	Maximino Carbo
Gloria Concepcion	Delia A. Osorio
Juana Ayala	[Ana Delia]
Felix B. Ramos	Aurea Santana
Miguel Andrillon	Emerita Escudero
Jesus Terreforte	Ramon Matos Cintron
Julio Vega	Hiram M. Miranda
Esmelin Santos	Francisco Jimenez
Manuel Vazquez	Heriberto Trujillo
Felix Ramirez	Hector Guevarez
William Rivera	Ana M. Guardiola
Monserrate Colon	Rafael Matos
Conchita Rodriguez	William Martinez
Carmen de Jesus	Maria de Jesus
Lydia Noguera	Ana Verte Calderon

Matilde Ramos
Elba Iris Verdejo
Sarah Algarin
Basilisa Rivera Garcia
Juanita Hernandez
Gloria Caballero
Domingo P. Morales
Victor Cruz
Iris C. Hernandez
Filiberto Jaime
Jesus Diaz
Remuel Q. Perez
Juan M. Colon
Carmelo J. Caldera
Norberto A. Cruz
Isaias Diaz Virella
Carlos Gonzalez
Roberto Perira
Fernando V. Vazquez
Valentian Hernaiz Delgado